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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 843

BETHLEHEM STEEL COMPANY,
Petitioner,

—against—

FRANK A. CARDILLO, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, Second Compensation District,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT R. CONNELLY,
Counsel for Petitioner,
15 Broad Street,
New York 5, N. Y.

April 9, 1956.

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In the

Supreme Court of the United States

October Term, 1955

Bethlehem Steel Company, *Petitioner,* —*against*— Frank A. Cardillo, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, Second Compensation District, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on January 11, 1956 (R. 20; App. 17).* That judgment pursuant to the opinion of the Court (R. 17-19; App. 14-16), affirmed orders of the United States District Court for the Eastern District of New York granting respondent's motion for summary judgment and denying petitioner's motion for judgment on the pleadings. The action was brought pursuant to § 21 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1436 (1927), as amended, 33 U.S.C. § 921 (1952), to set aside an award

*References marked "App." are to the appendix to this petition.

of compensation granted by respondent under said Act to one Philip McDermott, an employee of petitioner, for 22.6% occupational impairment of hearing (R. 6-9). The award was made by respondent notwithstanding his concession that the impairment here in question did not constitute a "disability", as that term is defined in the Act (R. 4, 10).

OPINION BELOW

The opinion of the Court of Appeals (R. 17-19) is reported at 229 F. 2d 735 (2nd Cir. 1956), and is printed in the Appendix hereto, *infra*, pp. 14-16.

JURISDICTION

The judgment of the Court of Appeals affirming the orders of the District Court was entered January 11, 1956 (R. 20; App. 17).

The jurisdiction of this Court is invoked under § 1254 (1) of the Judicial Code [28 U. S. C § 1254(1)].

QUESTION PRESENTED

Whether an award of compensation may be granted under the Longshoremen's and Harbor Workers' Compensation Act for an injury that does not result in disability.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. (1927), 33 U. S. C. §§ 901 *et seq.* (1952), provides, in relevant part, as follows:

> "§ 2. Definitions. When used in this chapter—
>
> ". . .
>
> "(2) The term 'injury' means accidental injury or death arising out of and in the course of

employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the wilful act of a third person directed against an employee because of his employment.

". . .

"(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

"§ 3. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee . . .

". . .

"§ 8. *Compensation for disability.* Compensation for disability shall be paid to the employee as follows:

". . .

"(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

". . .

"(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

". . .

> "(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member."

> "§ 21. *Review of compensation orders.* . . . (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred . . ."

STATEMENT

Petitioners complaint herein avers that respondent is a Deputy Commissioner for the Second Compensation District under the Longshoremen's and Harbor Workers' Compensation Act (herein sometimes called the Act) and that petitioner is engaged in the business of ship repair at, among other places, its Staten Island Yard (R. 3-4). It is further averred that since about June 1938, McDermott has been employed by petitioner as a boilermaker at its Staten Island Yard and that on April 2, 1954, he filed a claim with the Bureau of Employees' Compensation seeking compensation for impairment of hearing said to have been sustained in the course of his employment by petitioner (R. 4).

The complaint further avers:

> "6. Such impairment of hearing did not result in any incapacity on the part of said Philip McDermott to earn the wages which he was receiving at the time of the injury in the same or any other employment." (R. 4)

It is further averred that on December 2, 1954, respondent made an award of compensation to McDermott, a copy of which is annexed to the complaint (R. 4, 6-9). The award was a schedule award under § 8(c)(13) of the Act for 22.6% impairment of hearing. Paragraph 8 of the complaint avers that such award

> " . . . is not in accordance with law but contrary thereto for the reason that the Longshoremen's and Harbor Workers' Compensation Act does not authorize an award of compensation for impairment of hearing where the claimant has not sustained a loss of earning capacity." (R. 4)

A mandatory injunction setting aside the award and directing that the compensation claim be dismissed is prayed for (R. 5).

Respondent in his answer admits every averment of the complaint except the averments of paragraph 8 (R. 10-11), thereby limiting the issue in this case to a single question of law which has never been squarely passed upon by this Court.

In admitting the averments of paragraph 6 that McDermott's "impairment of hearing did not result in any incapacity" on his part "to earn the wages which he was receiving at the time of the injury in the same or any other employment", respondent admits that McDermott's injury did not result in any disability, as defined in the Act. (See § 2(10) of the Act quoted *supra*, p. 3.) In the face of that admission, the Court below held that the award was valid, notwithstanding the clearly expressed command of the Congress that compensation may be awarded under the Act only in respect of injuries (including injuries scheduled in § 8) which result in disability.

REASONS FOR GRANTING THE WRIT

1. In deciding that the Act authorizes an award of compensation where the injury in respect of which compensation is sought has admittedly not resulted in disability, the Court below has decided an important question of federal law which has not been, but should be, definitely settled by this Court.

The Act does not purport to provide compensation for all injuries suffered in the course of employment. Its coverage is limited by § 3 of the Act to "disability or death", and § 8 of the Act (under which the award here in question was granted) is specifically restricted to "compensation for disability".

"Injury" and "disability" are separately defined in the Act. The term "injury" includes, in general, any accidental injury or occupational disease arising out of employment. "Disability", on the other hand, is defined to mean solely

> ". . . incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment."

Congress has thus made manifest its intention that only those injuries which result in impaired earning capacity may be compensated under the Act.* The holding of the Court

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*The bill (S. 3170) which became the Longshoremen's and Harbor Workers' Compensation Act was described on the occasion of its final debate in the Senate as a measure "to provide compensation for disability or death resulting from injury to employees in certain maritime employments." 68 Cong. Rec. 5900 (1927). The most vigorous advocates of the bill during the preceding debate in the House of Representatives were careful to point out that it was not intended to enact a system of health insurance for covered employees but was intended to compensate employees only for disability attributable to an injury or disease arising out of employment. 68 Cong. Rec. 5413 (1927).

below that the injury in question is compensable notwithstanding the admitted absence of consequent disability as defined by the statute is thus contrary to the express provisions of the Act and presents a single question of law which this Court has never before had occasion to settle.

The question presented is manifestly an important one, involving as it does a fundamental issue as to the coverage of a federal statute under which hundreds of thousands of employees each year seek workmen's compensation benefits. *Forty-First Annual Report of the Secretary of Labor* 32 (1953); *The Secretary of Labor Reports* 18 (1954).

2. While this Court has not, as noted above, specifically ruled on the question of law here at issue, the decision of the Court below is in conflict with the decision of this Court in *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197 (1952), which recognized that the words "injury" and "disability" are separately defined in the Longshoremen's and Harbor Workers' Compensation Act and have distinct meanings. This Court in *Pillsbury* based its decision specifically upon that distinction, speaking through Justice Minton as follows:

> "We are not free, under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability.' Congress knew the difference between 'disability' and 'injury' and used the words advisedly. This view is especially compelling when it is noted that the two words are used in the same sentence of the limitations provision; therein 'disability' is related to the right to compensation, while 'injury' is related to the period within which the claim must be filed. Furthermore, Congress defined both 'disability' and

> 'injury' in the Act, and its awareness of the difference is apparent throughout. Thus, we think that when Congress used 'disability' and 'injury' in the same sentence, making each word applicable to a different thing, it did not intend the carefully distinguished and separately defined words to mean the same thing. . . ." 342 U. S. at 199-200.

Justices Burton, Black and Douglas dissented with respect to the statute of limitations question then before this Court for decision, but they were equally careful to point out (in an opinion written by Mr. Justice Burton) the difference between the words "disability" and "injury":

> "That the Act is concerned solely with compensation for disability or death appears on its face. Compensation is not payable to an employee merely because he has been in an accident in the course of his employment, nor even because he has suffered physical damage from that accident. The Act allows compensation only when the employee also has suffered a resulting loss of earning power.
>
> "The Act expressly limits 'injuries' to those of a certain origin by stating that they must arise out of and in the course of the employee's employment. It allows compensation only for resulting disability or death. It defines the required disability as a diminution of earning power." 342 U. S. at 201-02.

See also *Kobilkin* v. *Pillsbury,* 103 F. 2d 667 (9th Cir. 1939), *affirmed by equally divided court,* 309 U. S. 619 (1940); and *cf. New York Central R. R. Co.* v. *White,* 243 U. S. 188, 205 (1917); *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 240, 243 (1917); *Ward & Gow* v. *Krinsky,* 259 U. S. 503, 512-13, 515 (1922).

The decision of the Court below that compensation is payable to any employee who sustains one of the injuries listed in § 8 of the Act irrespective of whether such injury has resulted in disability is thus in obvious conflict with the decision of this Court in *Pillsbury* in that it disregards the clear distinction between "injury" and "disability" which this Court recognized in that case.

3. By holding that "as to any schedule loss, there is a conclusive presumption of loss or reduction of wage-earning capacity" (R. 18; App. 15), the Court below has construed the Act in such a way as to conflict with the Due Process Clause of the Fifth Amendment.

This Court has on many occasions held that, while the Congress or state legislatures may enact that proof of a mediate fact or group of facts shall give rise to a rebuttable presumption of an ultimate fact or shall constitute prima facie evidence of an ultimate fact, such statutory presumptions are invalid if

> (1) there is not a rational connection between the mediate fact provided and the ultimate fact presumed; and
>
> (2) a party is precluded from disproving the ultimate fact presumed.

Those requirements were stated by this Court in *Western & Atlantic Railroad* v. *Henderson,* 279 U. S. 639, 642 (1929), as follows:

> "Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption

> casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property . . ."

And see, *e.g., Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 43 (1910).

The holding of the Court below that proof that an employee has sustained one of the injuries scheduled in § 8 of the Act gives rise to a conclusive presumption of disability—the ultimate fact upon which liability under the Act is predicated—offends due process of law upon both those grounds.

The fact proved was merely a fractional (22.6%) impairment of hearing. It is clearly unreasonable and arbitrary to rest upon that fact a conclusive presumption that such impairment of hearing resulted in incapacity of the employee "to earn the wages which he was receiving at the time of the injury in the same or any other employment". Respondent's answer admits that the hearing impairment did not in fact result in any such incapacity. (R. 10)

Furthermore, common observation and experience are a sufficient refutation of the assertion that every person whose hearing is in any degree impaired necessarily suffers a diminution in his earning capacity. It might equally be said that any person who could not with the naked eye read the standard optometrist's eye chart except by moving forward a few inches or a few feet from the standard distance must similarly be conclusively presumed to have

sustained a "loss or reduction of wage-earning capacity", since the provisions of § 8 authorizing proportionate compensation for partial "loss of use of a member" apply to eyes as well as to ears.

The conclusive presumption of disability which the Court below found instinct in § 8 of the Act also offends due process upon the second ground stated above. The ultimate fact upon which the statute predicates liability is stated to be conclusively established by proof of the mediate fact of injury, and an employer is precluded from presenting any defense to the main fact thus presumed. Such a presumption clearly falls within the ban of the cases cited above.*

It is true, of course, that the nature of schedule losses is such that, in the absence of proof to the contrary, disability could properly be presumed. It is also concluded that the amount of compensation payable for disability resulting from a schedule loss is conclusively established by the schedule. As Chief Justice Hughes stated with respect to the schedule provisions of the Act in his opinion for this Court in *Crowell* v. *Benson*, 285 U. S. 22, 41 (1932):

> ". . . In view of the difficulties which inhere in in the ascertainment of actual damages, the Con-

*The decisions of this Court abound with statements that a statutory presumption is invalid which denies a party an opportunity to rebut the ultimate fact presumed. Thus, for example, in *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 642 (1929), this Court condemned any presumption which had the effect of denying "a fair opportunity to repel it". In his opinion for the Court in *Bandini Co.* v. *Superior Court*, 284 U. S. 8 (1931), Chief Justice Hughes stated that a legislative presumption is invalid when it "operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense," and Chief Justice Stone, speaking for this Court in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938), pronounced that "a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

> gress was entitled to provide for the payment of amounts which would reasonably approximate the probable damages. . . ."

Judge Medina expressed the same view in *Iacone* v. *Cardillo*, 208 F. 2d 696, 699-700 (2d Cir. 1953)*:

> ". . . Schedules are set up not to put a 'price on certain parts of the human body, but to ameliorate an otherwise intolerable administrative burden by providing a certain and easily applied method of determining the effect on wage earning capacity of typical and classifiable injuries. . . ."

To construe the statute as providing that an employee who suffers a scheduled injury is presumptively entitled, in the absence of proof to the contrary, to be compensated for his impaired earning capacity in the amount established by the schedule is constitutionally inoffensive and is in harmony with the Congressional intent. But to hold that the schedule

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*In *Iacone*, the question presented was "whether claimant is entitled to a scheduled award for loss of an eye industrially blind as a result of a previous non-industrial accident." 208 F. 2d at 697. The court held that such a loss was not compensable since "Schedule awards must . . . be applied, not in a vacuum, but in terms of the wage-earning concept, which is the only principle that holds compensation law together as a consistent whole. Loss of earning capacity is the measure of compensation . . ." 208 F. 2d at 700. In the instant case and in *Travelers Insurance Co.* v. *Cardillo*, 225 F. 2d 137 (2d Cir. 1955, *cert. denied sub nom. Bushey & Sons* v. *Cardillo*, 350 U. S. 913 (1955), the court below purported to distinguish its holding in *Iacone* upon the ground that that case held "that the loss of a sightless eye was not a schedule loss under § 908(c)." (R. 19) The purported distinction ignores the fact that schedule losses are described by the statute solely as losses of, or losses of use of, parts of the body. If the mere fact that a loss occurred gave rise to a right to compensation, Iacone would clearly have been entitled to compensation. The court correctly concluded in *Iacone* that a physical loss unaccompanied by impaired earning capacity is not compensable under the Act, but failed to adduce any rational ground for its conclusion in the instant case that a partial loss of hearing is compensable notwithstanding the admitted absence of any effect upon earning capacity.

sets up a conclusive presumption of the very fact upon which the employer's liability is dependent is to construe the statute in a way that deprives the employer of property without due process of law. The decision of the Court below accordingly calls for the exercise of the reviewing power of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT R. CONNELLY,
Counsel for Petitioner,
15 Broad Street,
New York 5, N. Y.

April 9, 1956.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 206—October Term, 1955.
(Argued December 22, 1955 Decided January 11, 1956.)
Docket No. 23819

BETHLEHEM STEEL COMPANY,
Plaintiff-Appellant,

—v.—

FRANK A. CARDILLO, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, Second Compensation District,
Defendant-Appellee.

Before:

FRANK, HINCKS and LUMBARD,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, entered by Judge Inch. AFFIRMED.

CRAVATH, SWAINE & MOORE (Albert R. Connelly and Donald H. Rivkin, of counsel), *for appellant.*

LEONARD P. MOORE (Elliott Kahaner, of counsel), STUART ROTHMAN, WARD E. BOOTE and HERBERT P. MILLER, *for appellee.*

FRANK, *Circuit Judge*:

Plaintiff brought this action to set aside an award of compensation, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Section 901 *et seq.* The Deputy Commissioner had awarded Philip McDermott compensation for loss of hearing resulting from his employment for fifteen years as a boiler-maker. Plaintiff's complaint alleged that McDermott's impairment of hearing "did not result in any incapacity to earn the wages which he was receiving at the time of the injury." Defendant's answer did not deny this allegation. Plaintiff made a motion for judgment on the pleadings, and defendant made a cross-motion for summary judgment. The district judge denied plaintiff's motion, granted defendant's, and entered judgment for defendant. Plaintiff has appealed.

We affirm. The judgment is clearly governed by our recent decision in *Travelers Insurance Company* v. *Cardillo,* 225 F. (2d) 137 (C. A. 2). The loss of hearing is covered by Section 908(13) and is thus one of the "schedule losses" set forth in Section 908, and in *Travelers* we held that, as to any schedule loss, there is a conclusive presumption of loss or reduction of wage-earning capacity.

Plaintiff relies on *Iacone* v. *Cardillo,* 208 F. (2d) 696 (C. A. 2). But in the *Travelers Insurance* case (at 144), we distinguished *Iacone,* saying, "In that case, the use of the eye was lost long prior to the industrial accident upon which the claim was found, and, consequently, we stated that

'Industrially, claimant lost nothing by the second injury.' In effect, we held that Congress did not contemplate compensation for the loss of a previous sightless eye when it made provision for scheduled awards in 33 U. S. C. Section 908(c)(5)." In other words, in *Iacone* we held not, as the appellant here suggests, that a schedule loss is compensable only on proof of loss of earning capacity, but rather that the loss of a sightless eye was not a schedule loss under §908(c).

Affirmed.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of January one thousand nine hundred and fifty-six.

Present:

Hon. Jerome N. Frank,
Hon. Carroll C. Hincks,
Hon. J. Edward Lumbard,
Circuit Judges.

Bethlehem Steel Company,
Plaintiff-Appellant,

v.

Frank A. Cardillo,
Deputy Commissioner, etc.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 843

BETHLEHEM STEEL COMPANY, PETITIONER

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES COMPENSATION, SECOND COMPENSATION DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and order of the Deputy Commissioner (R. 6-8) are not reported. The orders of the District Court denying petitioner's motion for judgment on the pleadings (R. 15) and granting the Deputy Commissioner's cross-motion for summary judgment (R. 16) are likewise not reported. The opinion of the Court of Appeals (Pet. App. 15-16, R. 17-19) is reported at 229 F. 2d 735.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1956 (R. 20). The petition for a writ of certiorari was filed on April 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an award under the Longshoremen's and Harbor Workers' Compensation Act is valid where the employee, as a result of his employment, has suffered a "schedule loss" under the Act (permanent partial binaural loss of hearing) without losing wage-earning capacity.

STATUTE INVOLVED

The pertinent parts of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, read as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. * * *

* * * * *

COVERAGE

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee * * *

* * * * *

COMPENSATION FOR DISABILITY

SEC. 8. Compensation for disability shall be paid to the employee as follows:

* * * * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

* * * * *

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks.

Compensation for loss of hearing of both ears, two hundred weeks.

* * * * *

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * *

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Second Circuit affirming the orders of the District Court which refused to enjoin an award made by respondent under the Longshoremen's and Harbor Workers' Compensation Act. The pertinent facts may be summarized as follows:

Philip McDermott had been employed by petitioner for fifteen years as a boilermaker, engaged in the repair of vessels (R. 6-7). McDermott's work was such that, while performing his regularly assigned duties, he was constantly exposed to loud noises. These noises cumulatively caused a permanent partial loss of hearing in both ears (R. 7). He first had difficulty with his hearing in April 1953 and, after an examination the following year by an ear specialist who declared that the loss of hearing had been caused by his employment, McDermott, on April 2, 1954, filed a claim for compensation for this loss of hearing. (R. 4, 7). Respondent, the Deputy Commissioner,

found that McDermott had suffered permanent partial disability by virtue of a 22.6% binaural loss of hearing,[1] and that he was therefore entitled to 45.2 weeks' compensation (22.6% of 200 weeks, the statutorily scheduled amount for full loss of hearing) at the maximum rate of $35.00 per week, or a total amount of $1,582 (R. 7). Respondent thereupon entered an award for that amount in McDermott's favor (R. 4, 8).

Petitioner filed suit in the District Court under Section 21 (b) of the Act, 33 U.S.C. 921(b), seeking to enjoin the award on the ground that it was not issued according to law, as the hearing loss suffered by McDermott did not, in fact, result in any incapacity to earn the wages which he was receiving at the time of his injury. (R. 3-5). Respondent denied only that the award was unlawful (R. 10) and, when petitioner moved for judgment on the pleadings, cross-moved for summary judgment (R. 12, 13). The District Court denied petitioner's motion. It then granted respondent's cross-motion (R. 15, 16).

On appeal, the Court of Appeals affirmed, holding that:

> * * * The judgment is clearly governed by our recent decision in *Travelers Insurance Company* v. *Cardillo*, 225 F. (2d) 137 (C.A. 2) [certiorari denied, 350 U.S. 913]. The loss of hearing is covered by Section 908 (13) and is

[1] The degree of hearing loss was stipulated by the parties to have been 22.6%.

thus one of the "schedule losses" set forth in Section 908, and in *Travelers* we held that, as to any schedule loss, there is a conclusive presumption of loss or reduction of wage-earning capacity [R. 18].

ARGUMENT

1. In seeking review of a compensation award that has been twice affirmed by the lower courts, petitioner bases its argument upon the misconception that respondent contends and that the Court of Appeals held, notwithstanding the provisions of Sections 3 and 8 of the Act, *supra*, pp. 3-4, that compensation was lawfully awarded to McDermott although he was not "disabled" (Pet. 5, 6). To the contrary, respondent's position, as adopted by the Court of Appeals, has consistently been that the loss of a body member, or the loss of its use, is *per se* a "disability" within the meaning of Sections 3 and 8, irrespective of any resultant wage loss, *i.e.*, that McDermott, who suffered a schedule loss in permanently and partially losing his hearing in both ears, is conclusively presumed to have also suffered a reduction in earning capacity to the extent listed in the schedule, thereby satisfying the statutory requirement that he be "disabled".

This presumption is by no means arbitrary or irrational as urged by petitioner. Although McDermott may not at this moment have suffered any loss in earning capacity, his diminished hearing could easily affect future earnings. Indeed,

the underlying purpose of a workmen's compensation loss schedule such as that contained in Section 8(c) of the Act *supra*, pp. 3-4, is to relieve the administering agency from the almost impossible task of determining in each case the potential as well as actual wage loss resulting from the severe and immeasurable injury caused by loss of a body member or its use. By establishing the conclusive presumption that wage loss occurred in the amounts listed in the schedule the Act obviates this difficulty.

There are few principles in the law of workmen's compensation that are better established than the proposition that "if the loss of a member, or impairment of a faculty, * * * is one which is provided for in the schedule * * * this in itself establishes a compensable disability, irrespective of any wage loss." *Green Bay D.F. Co.* v. *Industrial Commission*, 265 Wis. 38, 60 N.W. 2d 409, 412 (1953).[2] The courts of at least a dozen states, including those of New York, whose workmen's compensation laws served as a pattern for the Longshoremen's and Harbor Workers' Compensation Act, have likewise held that the existence of wage loss is irrelevant when there has been a schedule loss. See, for example, *Agricola Fur-*

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[2] That case involved a schedule loss caused by occupational disease rather than physical injury but there is no reason for not applying this principle to all schedule losses, especially since the statute itself makes no distinction but defines "injury" as including occupational disease as well as traumatic injury. Section 2(2), *supra*, p. 2. Moreover, all of the other cases cited involved traumatic injury.

nace Co. v. *Smith,* 239 Ala. 488, 195 So. 743 (1940); *Williams* v. *Industrial Commission,* 73 Ariz. 57, 237 P. 2d 471 (1951); *Dombrozzi* v. *E. Gross & Co.,* 112 Conn. 627, 153 Atl. 780 (1931); *H. K. Toy & Novelty Co.* v. *Richards,* 68 Ind. App. 653, 117 N.E. 260 (1917); *Stammers* v. *Banner Coal Co.,* 214 Mich. 215, 183 N.W. 21 (1921); *Otoe Food Products Co.* v. *Cruickshank,* 141 Neb. 298, 3 N.W. 2d 452 (1942); *DeZeng Standard Co.* v. *Pressey,* 86 N.J.L. 469, 92 Atl. 278, affirmed, 88 N.J.L. 382, 96 Atl. 1102 (1915); *Rosati* v. *Despatch Shops Inc.,* 298 N.Y. 813, 83 N.E. 2d 860 (1949); *Rowe* v. *McGovern,* 254 App. Div. 432, 5 N.Y.S. 2d 626 (1938); *State ex rel. Dudley* v. *Industrial Commission,* 135 Ohio St. 121, 19 N.E. 2d 895 (1939); *Winona Oil Co.* v. *Smithson,* 87 Okla. 226, 209 Pac. 398 (1922); *New Jellico Coal Co.* v. *Gilburth,* 187 Tenn. 606, 216 S.W. 2d 329 (1948); *Nicely* v. *Virginia E. & P. Co.,* 195 Va. 819, 80 S.E. 2d 529 (1954).

The rationale of this principle is succinctly stated as a universal rule of workmen's compensation laws in 2 Larson, *Workmen's Compensation Law,* Sec. 58.10 (1952):

> Schedule-type payments for permanent partial disability appear on the surface to be so different from regular wage-loss benefits that they might seem to be based on an entirely different principle. The typical schedule provides that, after the injury has become stabilized and its permanent effects can be ap-

praised, benefits described in terms of regular weekly benefits for specified numbers of weeks shall be paid * * *. *These payments are not dependent on actual wage-loss. Evidence that claimant has been regularly employed at greater earnings than before is completely immaterial.* [Citing cases.]

This is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law—that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that *the effect on earning capacity is a conclusively presumed one, based on observed probabilities in many similar cases, instead of a specifically proved one, based on the individual's actual wage-loss experience.* The effect must necessarily be a presumed one, since it would be obviously unfair to appraise the impact of a permanent injury on earning capacity by looking at claimant's earning record for some relatively short temporary period preceding the hearing. The alternative is to hold every compensation case involving any degree of permanent impairment open for a lifetime, making specific calculations of the effect of the impairment on claimant's earnings each time claimant contends that his earnings are being adversely affected. To avoid this impossible administrative task, the apparently

> cold-blooded system of putting average-price tags on arms, legs, eyes and fingers has been devised. [Emphasis supplied.]

2. Petitioner asserts (Pet. 8-9) that the decision below confuses the statutory terms "injury" and "disability" and hence is in conflict with language in *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197. However, the *Pillsbury* case, where this Court carefully distinguished "injury" and "disability", did not concern a schedule loss but a limitations problem. In this case, unlike *Pillsbury*, when McDermott lost his hearing in both ears he not only suffered an "injury" within the meaning of Section 2(2) of the Act, *supra*, p. 2, but, because loss of hearing is a scheduled loss under Section 8(c), *supra*, pp. 3-4, he also suffered a "disability" within the meaning of Section 2(10) of the Act, *supra*, p. 3. There has thus been no confusion between the terms "injury" and "disability"; the courts below merely found that, in view of the facts and of the statutory scheme, McDermott suffered both an "injury" and a "disability".

The decision of the court below is clearly correct and is not in conflict with any decision of this Court or with any decision of a lower federal court. It is consistent with, and follows, the previous decision of the court below in *Travelers Insurance Co.* v. *Cardillo*, 225 F. 2d 137, certiorari denied *sub nom. Bushey & Sons* v. *Cardillo*, 350 U.S. 913.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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